

IN THE COUNTY COURT AT CENTRAL LONDON

Claim No: A27YP399

HHJ Walden-Smith

Between:

MISS MERCEL HISLOP

Claimant/Appellant

and

MISS LAURA PERDE

Defendant/Respondent

JUDGMENT

1. This is the judgment in the “rolled-up” hearing of the application for permission to appeal and, if permission is granted, the appeal against the decision of Deputy District Judge Lenon QC refusing the Claimant’s application for indemnity costs and allowing the relevant fixed costs down to the date of acceptance. It raises an important question of principle with respect to the operation of CPR part 36 in cases where a Claimant’s part 36 offer is accepted out of time and where the claim is subject to the fixed costs regime of CPR 45 Section IIIA.
2. I am very grateful to both Mr Bacon QC, acting for the Claimant/Appellant and Mr Malleliu and his instructing solicitors, acting for the Defendant/Respondent for their submissions and for the submission of additional authorities subsequent to the hearing. I shall, for ease of reference in this judgment, simply refer to the parties as the Claimant and the Defendant respectively.

The Background

3. The substantive claim in this matter arose from a road traffic accident which occurred on 17 December 2013. The Claimant brought a claim for damages for personal injury by way of a Claims Notification Form dated 7 April 2014, initially commenced under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (known as "PAP"). The Claimant was suffering a muscular neck sprain and an exacerbation to a pre-existing back injury.
4. The Defendant did not respond in respect of liability and so the claim was removed from PAP on 1 May 2014.
5. On 21 July 2014, the Claimant made her first Part 36 offer to settle her claim in the sum of £2,100. The Defendant responded by saying that liability was in issue and that the offer was therefore rejected. Proceedings were issued on 18 September 2014.
6. On 10 October 2014, the Defendant made a part 36 offer in the sum of £1,800, subject to liability being established and on the basis of a 50/50 split on liability. That offer was rejected by the Claimant on the basis that she did not consider herself responsible in any way for the accident.
7. On 11 November 2014, the Claimant made her second part 36 offer. This offer was in the sum of £1,500. The offer letter expressly set out that: *"The offer is intended to have the consequences of Part 36 of the Civil Procedure Rules. If accepted within a period of 21 days from the date of receipt of this letter, then such acceptance is on the basis that your client will be liable for our Client's costs in accordance with CPR 36.10... Part 36.14 provides for costs to be awarded on the Indemnity Basis together with enhanced interest following Judgment."*
8. The Defendant did not respond to that Part 36 offer and on 10 December 2014 a chasing email was sent noting that there had not been any response to the Claimant's part 36 offer and requesting clarification of the Defendant's position as soon as possible. There was no response to that chasing email and a further chasing letter was sent on 30 December 2014, asking for clarification within 7 days. A further chasing email was sent on 9 January 2015 as no response from the Defendant had been received (almost 2 months after the offer had been made).

9. Within approximately ½ hour after that email, the insurers acting for the Defendant replied rejecting the offer in these terms: *“The offer is rejected. Liability is in dispute and I cannot compromise with my client conceding that issue 100%. With a view to compromising the Defendant has already made offers both on liability and quantum. With a view to narrowing the issues do you want to agree quantum at £1500 subject to liability?”*
10. The Claimant did not respond to that email from the Defendant dated 9 January 2015 and a chasing email was sent by the insurers on 20 February 2015. An email was sent by the Claimant on 9 March 2015 stating that instructions had been taken regarding her position on liability and that *“My client is extremely reluctant to accept any offers regarding liability. I would therefore be grateful if you could confirm whether you are able to make any offers on a quantum basis only.”*
11. After the exchange of witness evidence, the solicitors for the Claimant wrote to the Defendant on 9 March 2016 pointing out how they considered the Defendant had positioned herself in the wrong lane for her direction of travel prior to the traffic accident and then set out: *“In respect of the above, we invite you to reconsider our offer of the 11th November 2014 and remind you that in the event that our client equals or betters her part 36 offer at Trial, indemnity costs will be sought following the recent decision in Broadhurst.”*
12. Subsequent to that letter asking the Defendant to reconsider the Part 36 offer of 11 November 2014 and the reiteration of the message that the Claimant would be seeking indemnity costs, there were phone calls made by the Claimant’s solicitors on 30 March 2015, 6 April 2015 and 20 May 2016 chasing settlement. On 20 May 2016 the solicitor from the Defendant’s insurers said that their client was not willing to settle and that she would be willing to offer £1,000 but that there was unlikely to be any better offer.
13. The offer of £1,000 to settle, inclusive of interest, was confirmed in a letter dated 20 May 2016 which letter set out the following:
“Take notice the Defendant offers to settle the claim pursuant to Section 1 of Part 36 of the Civil Procedure Rules and this offer is intended to have the consequences attached to the same. If the offer is accepted within 21 days of service of this notice the Defendant will be liable for the Claimant’s costs in accordance with Rule 36.13 of the Civil Procedure Rules.”
14. A chasing email with respect to that offer was sent by the Defendant on 27 May 2016, and it was rejected by the Claimant by an email dated 31 May 2016. After a telephone conversation between the parties’ solicitors on 2 June 2016 whereby it was made clear that the Claimant

was going to proceed to trial, the Defendant's solicitors wrote (with an apparent volte face) to say:

"We confirm that the Defendant accepts the Claimant's Part 36 offer to settle her claim in the total sum of £1,500 made on 11 November 2016 (sic. 2014)"

15. In response, the Claimant's solicitors wrote on 2 June 2016 to provide confirmation of the acceptance by the Defendant of the offer made by the Claimant in the sum of £1,500 in full and final settlement of the claim and stating that *"The offer is accepted on the condition that you accept responsibility for our costs and disbursements to be calculated on the fixed recoverable costs and indemnity costs basis..."* and that details of the Claimant's costs would be provided under separate cover. Those costs amounted to £2,372 with respect to fixed recoverable costs up to the expiry of the part 36 offer made on 11 November 2014 (namely 2 December 2014) and £5,534 from 4 December 2014 until the conclusion of the claim, a total costs bill of £7,906.
16. It is clear that by reason of the failure to accept the Part 36 offer within the time stipulated, and by allowing the matter to proceed as if to trial up to a date less than 7 days before the trial listing, a great deal more work was undertaken on the case and both time and resources were used up including on disclosure, witness evidence, listing questionnaires and preparation to trial including the trial bundle index. There was no change in the stance of the Claimant throughout the case and there is no change in the Defendant's position, save that at the last moment there was a decision not to go to trial.

The Consequences

17. As a consequence of the Defendant accepting the offer of the Claimant, the Claimant achieved an outcome which is at least as advantageous as her offer made on 11 November 2014, some 19 months before its acceptance. Had the Defendant not accepted the offer of the Claimant days before trial then she would have been required to pay the Claimant's post offer costs on an indemnity basis together with enhanced interest and 10% pursuant to the provisions of CPR 36.14(3) as it was prior to 1 April 2015 (the relevant iteration to the rules for the purposes of this matter).
18. By accepting the offer at the very late stage she did, the Defendant has (according to the judgment of DDJ Lenon QC) avoided the application of indemnity costs and other penalties that part 36 provides. Subsequent to the part 36 offer being made by the Claimant, and the acceptance days before the trial, the Claimant had incurred substantial costs in preparation for the trial. The Claimant's case is that those costs would not have been incurred had the

Defendant accepted the offer within the relevant period of the offer. The effect of DDJ Lenon QC's judgment is that the additional liability for costs falls on the Claimant and thereby reduces or wipes out the damages she has recovered. To put in summary form, the Claimant contends that such an outcome offends against fairness and encourages parties to delay in settling matters as the consequences of delaying until (almost) the eve of trial is to load the costs upon the Claimant who is likely to have a conditional fee arrangement that results in there being a higher success fee closer to trial which will reduce the damages in fact recovered. The Defendant who waits until the last moment to accept the Claimant's part 36 offer can accept out of time knowing that it will only be liable for a proportionate contribution towards the Claimant's costs.

The Judgment

19. The approved transcript of the judgment made on 3 October 2016 sets out that the application made on behalf of the Claimant was for costs to be assessed on the indemnity basis in respect of the period following the expiry of the Claimant's part 36 offer on 2 December 2014, that offer not having been accepted until a notice of acceptance of offer was served on 2 June 2016.
20. The DDJ referred to CPR 36.13(4)(b) providing that where a part 36 offer is accepted after expiry of the relevant period, the liability of the costs must be determined by the court and that there is no guidance in the rule itself as to the basis on which the court's discretion is to be exercised. He held it to be an apparently unfettered discretion and referred to the commentary on the rule stating that *"there is no presumption that the court would order a late accepting party to pay the other's costs on the indemnity basis so it is the standard basis unless there are some special factors. An authority for that bit of commentary is the decision of Mr Justice Coulson in Fitzpatrick Contractors v Tyco Fire and Integrated Solutions [2009] EWHC 274."*
21. DDJ Lenon QC proceeded to say that the starting point from both parties' perspectives is that in order to justify indemnity costs it has to be shown that there is something out of the norm in the way that the case has been conducted by the party against whom indemnity costs are sought. The argument put forward by the Claimant at that hearing, as recorded by the DDJ, was that the Defendant had allowed judgment to be entered in default but had successfully set that aside and that, many months after the Part 36 offer had been made by the Claimant, the Defendant had accepted that offer. No explanation had been advanced for that late change of heart and that in the circumstances that took the case out of the norm and justified an order for

indemnity costs. The solicitor for the defendant explained the late change of heart on the basis that it was close to trial and that it was a serious taxing ordeal for the defendant to go through. Counsel for the claimant pointed out that was no explanation as the nature of the trial and the fact that litigation could be an ordeal was obvious from the outset.

22. The DDJ found that the criteria for making an order for indemnity costs had not been made out as there was nothing which took the case out of the norm and he found, agreeing with the solicitor for the Defendant, *“there has to be a standout point that can be quickly drawn to the court’s attention and which makes it obvious that the case has been conducted abnormally and that, exceptionally, an indemnity costs order is justified.”*
23. The Defendant contends in this matter that the court is bound by *Fitzpatrick* in the way set out by DDJ Lenon QC and the judgment of DDJ Lenon QC is therefore unimpeachable. I will deal with the detail of the arguments on the authorities in due course, however I must first deal with the issue of whether there ought to be permission to appeal.

The Issue

24. The issue for determination is whether a claim which begins as a PAP claim, but then exits from PAP, is one in which the Court ought to be awarding indemnity costs where a Claimant’s Part 36 offer is accepted outside its relevant period. Alternatively, is the Claimant limited to fixed costs or fixed costs and then costs on a standard basis. If the court can award costs on an indemnity basis is the court doing so because there is a “presumption” in favour of the award of such costs or is it because the court is considering whether indemnity costs ought to be awarded looking at the conduct matters set out in CPR 44.2 so that the late acceptance of an offer is considered “out of the norm” such that there should be an indemnity costs order.
25. This case raises important questions of principle as to the operation of CPR part 36 particularly where, as in this case, the claim is subject to the fixed costs regime of CPR 45 Section IIIA. The Defendant disputes that indemnity costs ought to have been awarded and seeks to uphold the decision of DDJ Lenon QC. The Defendant’s contention is that the DDJ applied the relevant rules and acted entirely within his discretion and that the Claimant, by this appeal, is seeking to establish a presumption in favour of indemnity costs being awarded in cases such as this.
26. The Defendant had originally sought to contend that fixed costs should apply throughout but had agreed that the costs could be awarded on the indemnity basis in appropriate

circumstances. DDJ Lenon QC did not make an award of costs on an indemnity basis but awarded fixed costs. It does not appear that he considered there could be assessed costs on the standard basis.

27. The Claimant's contention is that the DDJ was wrong not to award costs on an indemnity basis and that where a Claimant's part 36 offer is accepted out of time without good reason, the presumption ought to be that costs will be awarded on the indemnity basis with respect to the work carried out following the date on which the offer should have been accepted.

Permission to Appeal

28. CPR 52.6 provides that

"(1) Except where rule 52.7 applies, permission to appeal may be given only where –
(a) the court considers that the appeal would have a real prospect of success; or
(b) there is some other compelling reason for the appeal to be heard."

29. I am giving permission to appeal in this matter as, before going through the arguments in detail, the Claimant has a real prospect in succeeding in establishing that the DDJ was wrong in his determination.

30. Additionally this is a case where there is a compelling reason for the appeal to be heard. The new costs rules with respect to proportionality introduced on 1 April 2013 and the inception of fixed costs in RTA claims means that the courts are bound to consider the circumstances in which indemnity costs orders ought to be made where there is a late acceptance of Part 36 offers.

31. There have been a number of cases dealing with costs relating to Part 36 accepted offers. Subsequent to the hearing I have been referred to three cases decided by Circuit Judges, namely HHJ Gosnell in *Richardson v Wakefield Council*; HHJ Gargan in *Anderson v (1) Ladler & (2) Aviva Insurance Limited*; and HHJ Graham Wood QC in *McKeown v Venton*. I came to a decision that it was better for me not to consider the cases before making my determination. I therefore deliberately did not read these cases until I had reached my own view on the relevant parts of the rules as these cases are not binding on me and I wanted to come to my own decision on my own interpretation of the Civil Procedure Rules. As it has transpired, I have agreed with some of the conclusions in these authorities, but not all.

The Relevant Civil Procedure Rules

32. The difference between costs on an indemnity or on a standard basis is the requirement for proportionality. The removal of the requirement for proportionality from the indemnity basis costs award is contained in CPR 44.3 which provides:

“(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(3) Where the amount of costs is to be assessed on an indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.”

33. CPR 36.10A provided as follows

“Costs consequences of acceptance of Part 36 offer where Section IIIA of Part 45 applies:

36.10A

(1) This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1)

(2) Where a Part 36 offer is accepted within the relevant period, the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.

(3) Where –

(a) a defendant’s Part 36 offer relates to part only of the claim; and

(b) at the time of serving notice of acceptance with the relevant period the claimant abandons the balance of the claim, the claimant will be entitled to the fixed costs in paragraph (2).

(4) Subject to paragraphs (5), (5A) and (5B), where a defendant’s Part 36 offer is accepted after the relevant period –

(a) the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and

(b) the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.

34. Consequently, where a Claimant accepts a Defendant's part 36 offer the Claimant gets fixed costs; where a Claimant accepts the Defendant's offer outside the relevant period for acceptance the Claimant gets fixed costs up to the date where the offer expired and is required to pay the Defendant's costs after the expiry of the offer. This position continues under the CPR post 1 April 2015, as contained in CPR 36.20.

35. CPR 36.10A did not deal with the situation where, as here, it is a Claimant's Part 36 offer which has been accepted late.

36. The costs consequences of the acceptance of a part 36 offer are set out in CPR 36.10:

"Costs consequences of acceptance of a Part 36 offer

36.10

(1) Subject to rule 36.10A and to paragraphs (2) and (4)(a) of this rule, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror.

(2) Where –

(a) a defendant's Part 36 offer relates to part only of the claim; and

(b) at the time of service notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will be entitled to the costs of the proceedings up to the date of service notice of acceptance unless the court orders otherwise.

(3) Costs under paragraphs (1) and (2) of this rule will be assessed on the standard basis if the amount of costs is not agreed.

(4) Where –

(a) a Part 36 offer that was made less than 21 days before the start of the trial is accepted; or

(b) a Part 36 offer is accepted after expiry of the relevant period, if the parties do not agree liability for costs, the court will make an order as to costs.

(5) Where paragraph 4(b) applies, unless the court orders otherwise –

- (a) the claimant will be entitled to the costs of the proceedings up to the date on which the relevant period expired; and*
- (b) the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance."*

Analysis

37. In my judgment, CPR 36.10 makes clear that if the offer is accepted within the relevant period then, within the fixed costs regime, fixed costs will be awarded; if accepted outside the relevant period then costs will be fixed within the relevant period and the court will make an order as to costs if those costs are not agreed between the parties and the "offeree [either Claimant or Defendant] will be liable for the offeror's costs [either Defendant or Claimant] for the period from the expiry of the relevant period until date of acceptance." Whether those costs are standard or indemnity is a matter for the discretion of the judge.
38. In my judgment, the rule creates neither a presumption in favour of costs being on the standard basis or on the indemnity basis. The rules committee would have been very well aware of the infinite variety of circumstances surrounding the late acceptance of a Part 36 offer and, while acceptance within the relevant period can be given a clear direction as to the consequences, the rules relating to late acceptance deliberately remain silent (in my view deliberately) so as to give the Judge determining the issue (if there is lack of agreement) a wide discretion to do that which he considers appropriate in all the circumstances of the case.
39. In *Fitzpatrick Contractors Ltd v Tyco Fire*, Coulson J held as follows:
- "First, I am bound to note that there is no reference at all within CPR 36.10(4) and (5) to a presumption that, unless it is unjust to do so, the court will order a late-accepting defendant to pay the claimant's costs on an indemnity basis*
- Secondly, I consider that the court has to be very careful before inserting into a rule, which is silent costs, a presumption on this kind, extracted from a different rule altogether...*
- Thirdly... If, therefore, there was a presumption that indemnity costs would apply under CPR 36.10(5), when an offer was accepted outside the period, it seems to me that the rule would say so. It does not, and, in my judgment, that is not an oversight or an omission; it is because either standard or indemnity costs may be applicable where an offer is accepted after the relevant period, depending on the analysis under CPR 44.3.*
- Finally, I am not persuaded that, as a matter of policy, it would be appropriate to import an indemnity costs presumption into CPR 36.10(4) and (5). A defendant is entitled to accept an offer beyond the period of acceptance. In a complex case such as this, a defendant should be encouraged continuously to evaluate and re-evaluate the claim and its own response to that*

claim, so that even if the defendant had originally concluded that it was not going to accept the offer, it should always be prepared to change its mind. The CPR should be interpreted in a way that encourages such constant re-evaluation.

Furthermore, it is not as if the claimant is deprived of the remedy of indemnity costs altogether. The parties have rightly agreed that, in this case, the claimant is entitled to seek indemnity costs in the conventional way, by reference to conduct, and matters of that sort, pursuant to CPR 44.3.

Accordingly, for these reasons, I reject Mr Livesey's primary argument that, by analogy with CPR 36.14, there is a presumption that the claimant is entitled to indemnity costs pursuant to CPR 36.10."

40. I agree with this analysis of the rules. Silence does not create a presumption that indemnity costs should apply. Nor does it create a presumption that standard costs should apply. Unlike CPR 36.10(3) where there is a presumption that costs are limited to the standard basis, there is no presumption as to the basis of assessment and the Court is entitled to consider all the circumstances of the case in order to determine the basis upon which those costs should be assessed pursuant to the provisions of CPR 44.3.
41. CPR 36.14 dealt with the effect on costs after judgment. A Claimant is entitled to indemnity costs, amongst other things, where the *"judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's part 36 offer."*
42. In *Broadhurst v Tan*[2016] EWCA Civ 94, the Master of the Rolls dealt with the point of construction arising from the apparent tension between the rules fixing costs in most lower value personal injury cases pursuant to section IIIA of Part 45 of the CPR and the provisions in Part 36 which specifically apply to such claims. It was held that *"The effect of rules 36.14 and 36.14A when read together is that, where a claimant makes a successful part 36 offer, he is entitled to costs assessed on the indemnity basis. Thus, rule 36.14 is modified only to the extent stated by 36.14A. Since rule 36.14(3) has not been modified by rule 36.14A, it continues to have full force and effect...Where a claimant makes a successful Part 36 offer in a section IIIA case, he will be awarded fixed costs to the last staging point provided by rule 45.29C and Table 6B. He will then be awarded costs to be assessed on the indemnity basis in addition from the date that the offer became effective."*
43. Mr Bacon QC, on behalf of the Claimant, relies upon *Broadhurst* with respect to establishing that the Court ought to have awarded costs on the indemnity basis once the relevant period for

accepting the Claimant's Part 36 offer had expired. He contends, and I agree with this, that the rule in CPR 36.10(4) was not modified or dealt with by CPR 36.10A and that the rule must therefore continue to apply. As a consequence of that finding, I also find that "unless the court finds otherwise" the claimant will be entitled to the costs of the proceedings up to the date on which the relevant period expired; and the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

44. I further agree with the submission that CPR 36.10A limits the application of fixed costs to where a Part 36 offer is accepted in time or where the Claimant accepts the Defendant's Part 36 offer and abandons the remainder of the claim or where the Defendant's Part 36 offer is accepted late (CPR 36.10A(2) and (3)). There is no such imposition of fixed costs for the period from the date of expiry of the relevant period to the date of acceptance, being the period of the Defendant delaying in accepting the Claimant's part 36 offer. The Claimant is entitled to assessed costs – either on the standard or indemnity basis. There is no presumption for costs to be awarded on the indemnity basis where a Claimant's offer has been accepted prior to trial albeit shortly before the trial. That presumption is reserved for when the Claimant obtains a judgment which is at least as advantageous to the claimant as the proposals contained in the Claimant's part 36 offer. That is not this case.
45. The court can, however, exercise its discretion to award indemnity costs under the provisions of CPR 44.2. It appears that the Defendant accepted that position at the hearing before DDJ Lenon QC, although did so on the proviso that the court would have to be satisfied that it would be "unjust" if such an order were not made.
46. The appropriate test for whether costs should be awarded on an indemnity basis is whether conduct has been "out of the norm": *Excelsior Commercial & Industrial Holdings v Salisbury Hammer Aspden & Johnson* [2002] CP Rep 67.
47. Mr Bacon QC contends that "it would be intolerable" for the court to conclude that the conduct of the Defendant in this matter, waiting 19 months before accepting the offer and then accepting that offer a matter of days before the trial, is not "out of the norm" in a post *Mitchell/Denton* world. While I fully understand the sentiment, this is a matter of discretion for the first instance judge to exercise and there is an equally valid argument raised by Mr Mallelieu on behalf of the Defendant that a party who settles a claim, albeit shortly before trial, should not be discouraged from doing so by the imposition of costs on an indemnity basis. There is a balance to be struck.

48. It seems to me that these two conflicting arguments, both directed towards the principle that the costs rules are designed to encourage settlement, give further support for my interpretation of the rules that there is neither a presumption for standard or indemnity costs. In the circumstances of a late acceptance of a Claimant's Part 36 offer, the Court is to assess the costs, so that there are not fixed costs, but the assessment is to be on either the standard or indemnity basis and it is for the Court to determine which is appropriate in all the circumstances of the particular case. Has the late acceptance of the offer been "out of the norm"?

49. Reference has been made to the decision of (Regional Costs Judge) DJ Besford in *Sutherland v Khan* (21 April 2016) and, while not binding, it is of interest. In *Sutherland v Khan* DJ Besford found that in circumstances where, such as these, a claimant's Part 36 offer had been made a long time before trial and there had been no change in the circumstances prior to the late acceptance of the offer then "*notwithstanding the comments of Coulson J, if there was no incentive or penalty there would be little point in a defendant accepting offers early doors as opposed to waiting immediately prior to trial. It also seems to me unsatisfactory that there should be penalties flowing if you do not beat an offer at trial, whereas if you settle before trial there are none. The position does not sit comfortably with the overriding objective of saving expense.*" While I partially agree with this analysis, there is, of course, a fundamental difference in settling a case before trial rather than waiting for judgment to be entered after trial – with all the savings of costs and court time if there is a settlement.

50. In my judgment, as I have set out above, the rules provide that in a case such as this which falls within the fixed costs regime, where a Claimant makes a Part 36 offer which is not accepted within the relevant period but is then accepted before trial, the Claimant is entitled to fixed costs until the end of the relevant period and then is entitled to assessed costs until date of acceptance. There is no presumption that those assessed costs will be assessed on the standard or indemnity basis. Indemnity costs are awarded where the Defendant does not accept the offer and then fails to better the Claimant's Part 36 offer at trial and there must be a distinction between the situation of settling, albeit very late, and allowing the case to go through to trial and then not bettering the offer made.

51. Whether the costs should be on a standard or indemnity basis is a matter for the discretion of the judge of first instance. While DDJ Lenon QC did not consider assessing the costs, he did consider the issues as to whether this was a case in which indemnity costs should be awarded.

52. DDJ Lenon QC set out that the reason why the Part 36 offer was accepted so late was *“the imminence of the trial and the fact that, for an individual, taking part in a trial is a serious, taxing ordeal for a layperson”*. Counsel for the Claimant at the hearing before DDJ Lenon QC point out that explanation did not provide any justification for the change of heart, the nature of the case having been obvious from the commencement of the case. The DDJ went on to say that he was not satisfied that this was a case which was “out of the norm” and he accepted the submission that in order for there to be an order for indemnity costs there had to be a “standout point” that can quickly be drawn to the court’s attention and which makes it obvious that the case has been conducted abnormally and that, exceptionally, an indemnity costs order is justified.

53. While I accept that the DDJ was wrong to suggest that in order for indemnity costs to be awarded there needs to be a standout point, he did properly consider whether this was a case where he felt, on the evidence before him, that it was out of the norm such that an order for costs assessed on an indemnity basis was appropriate. As Lord Woolf said in *Excelsior*:

“if the court is going to make an order for indemnity costs ... it should do so on the assumption that there must be some circumstance which justifies such an order being made ... there must be some conduct or (I add) some circumstance which takes the case out of the norm.”

Consequently, while it might be argued that he erred in law in referring to a higher test of the necessity of a standout point he was in fact considering whether the case was out of the norm, and therefore appears to have corrected his error.

54. It does not seem to me that the conclusion reached by DDJ Lenon QC that this was not a case where indemnity costs ought to be awarded, is a conclusion which could properly be said to be outside a proper exercise of discretion. The discretion exercised by a judge in determining the proper basis of the assessment of costs is a wide one and, in the pre-CPR cases of *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, following *Roache v News Group Newspapers* [1998] EMLR 161:

“Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors in the scale.” Per Sir Murray Stuart-Smith.

That principle still holds true, even though the culture relating to settling cases has changed. As the Chancellor, Sir Geoffrey Vos, said in *Ovm Petrom SA v Glencore International SA* [2017] EWCA Civ 195:

“The culture of litigation has changed even since the Woolf reforms. Parties are no longer entitled to litigate forever simply because they can afford to do so. The rights of other court users must be taken into account. The parties are obliged to make reasonable efforts to settle, and to respond properly to Part 36 offers made by the other side. The regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court’s powers can be expected to be used to their disadvantage. The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process.”

55. The DDJ had in mind the time it had taken the Defendant to accept the Claimant’s Part 36 offer, and the fact that the Part 36 offer was only accepted days before the hearing. While another judge may well have come to a different conclusion on the same facts, I cannot properly say that the DDJ in this case was wholly wrong and failed to balance the relevant matters in the scales.
56. A case in which the Defendant fails to accept a Part 36 offer for a considerable period of time and only accepts shortly before the trial, where there has not been any change in the case or reason for a late change of heart other than litigation nerves, is a case where the court is likely to consider whether an appropriate order is for indemnity costs. However, it is a matter for discretion of the judge as to whether, in any particular case, the behaviour of the Defendant in accepting the offer is such that it is appropriate for an indemnity costs order to be made. I am not willing to find in this case that the DDJ was acting outside his discretion in determining that this is a case where an assessment on the indemnity basis was not justified.

Conclusion

57. For the reasons I have set out in detail above, I have come to the conclusion that in a fixed costs case the appropriate order for costs in a case where a Part 36 offer has been accepted outside the relevant period, is fixed costs until the end of the relevant period and assessed costs thereafter until date of acceptance. Whether those costs are assessed on the standard or the indemnity basis is a matter for determination of the Judge exercising his discretion judicially. There is no presumption for either standard or indemnity costs, but the Judge in

determining that assessment in accordance with the provisions of CPR 44 must apply the correct legal test and take into account relevant matters, while disregarding the irrelevant.

58. I have found that the DDJ erred in determining that the order for costs ought to have been fixed throughout, although I am not interfering with his decision not to award costs on an indemnity basis. I therefore allow the appeal to the extent that the costs payable by the Defendant to the Claimant are fixed until 2 December 2014 and thereafter, until date of acceptance, costs assessed on the standard basis. I would be grateful if the parties could agree a form of order to be available for the formal handing down of the judgment. If there are any disagreements on the costs of this appeal then that can be adjourned to another date and dealt with by written submissions.